PANGLIMA ACES SDN BHD

v.

HIGHWAY BRICK WORKS (SERENDAH) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-1548-2000]
16 JUNE 2006

CIVIL PROCEDURE: *Summary judgment - Triable issue - Goods sold and delivered - Claim for price - Whether justified - Complaints as to defects and merchantability after goods used and consumed - Whether not a triable issue - Rules of High Court 1980 O. 14, Sales of Goods Act 1957, ss. 16(1)(a), 42*

CIVIL PROCEDURE: *Action - Commencement - Summary judgment for goods sold and delivered - Whether a final order - Application to set aside judgment - Whether inappropriate - Whether to appeal against judgment - Rules of High Court 1980, O. 14 r. 11*

This was an appeal against the decision of the learned senior assistant registrar ('SAR') dismissing the defendant's application to set aside a summary judgment which the learned SAR had earlier granted to the plaintiff. Essentially, the plaintiff's claim was for the price of petroleum products sold and delivered to the defendant. The defendant did not deny that its solicitors did not attend court at the hearing of the application for summary judgment, or that there was due delivery of the goods by the plaintiff. The defendant however averred that the solicitors had properly asked for an adjournment of the hearing and it was therefore wrong of the SAR not to grant the adjournment sought. It was further argued that summary judgment was inappropriate as the products delivered were defective and not of merchantable quality. The issue was whether the defendant, upon the arguments so put forth, had raised any triable issue as to justify the learned appellate judge to remit the case to a full trial.

Held (dismissing the appeal):

[1] The grant of an adjournment has always been at the absolute discretion of the court. Here, the SAR has considered the reasons given in the letter dated 8 May 2001 from the defendant's solicitors requesting for adjournment and found the same to be insufficient. (para 8)

[2] The justice of the case would lie with the plaintiff maintaining the judgment entered against the defendant. There were no procedural defect whatsoever in the order of the SAR handed down on 26 July 2001 and that judgment was regular. The SAR pronounced the judgment on the merits of the case and the defendant has failed to show any bona fide defence to warrant the application for summary judgment to be set aside. (para 9)

[3] The order of the SAR was in the nature of a final order. The SAR, in allowing the plaintiff's application to enter summary judgment under O. 14 Rules of the High Court 1980 ('RHC'), was then *functus officio*. Hence, the correct procedure was for the defendant to appeal against that decision and not to proceed under O. 14 r. 11 of the RHC. (para 10)

[4] Having taken delivery of the goods, the defendant must be held accountable for the payment thereof. Further, on the facts and in the circumstances, both ss. 42 and 16(1)(a) of the Sales of Goods Act 1957 (buyer deemed to have accepted goods and goods reasonably fit for the purpose for which it was sold) ought to be applied in favour of the plaintiff. In any case, the defendant had not only accepted the petroleum products but had proceeded to consume the same. That being so, if there were any complaints as to its quality, it was for the defendant to prove them and claim for damages. (paras 12 & 14)

[5] It was apparent that the defendant was unhappy with the price of the petroleum products that were sold and delivered by the plaintiff. The defendant wanted a lower price, a larger discount and a better rebate, yet claimed that the petroleum products were defective. Be that as it may, having utilised the products, the defendant was estopped from denying its merchantability. (para 16)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Development & Commercial Bank Bhd v. Cheah Theam Swee [1989] 2 CLJ 809; [1989] 1 CLJ (Rep) 474 HC ***(refd)***

Development & Commercial Bank Berhad v. Dato' KK Sharma [1987] 1 CLJ 268; [1987] CLJ (Rep) 566 HC ***(refd)***

Eastern Supply Co v. Kerr [1974] 1 MLJ 10 ***(refd)***

Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana [1982] 1 MLJ 77 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd [1995] 3 CLJ 171 CA ***(refd)***
MG Sheth & Ors v. Lam Thye Co Ltd [1954] 20 MLJ 230 ***(refd)***
Seng Hin v. Arathoon Sons Ltd [1968] 2 MLJ 123 ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***
Union Alloy (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd [1993] 3 CLJ 670 HC ***(refd)***
Universal Cable (M) Bhd v. Bakti Arena Sdn Bhd & Ors [2000] 3 CLJ 375 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 14 r. 11
Sale of Goods Act 1957, ss. 16(1)(a), 42

Other(s) source(s) referred to:
The Supreme Court Practice, 1997 edn, pp 182, 183

For the plaintiff - Karen Wilfred (Sharmini Naidu with her); M/s Shahrizat Rashid & Lee
For the defendant - Mohd Hanif Idris (Abdul Aziz Hamzah with her); M/s Zamani Ibrahim Tarmizan & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

[1] The parties were magnanimous. They agreed that the decision in this case – referring to D4-22-1548-2000, would bind the case in D4-22-1549-2000.

[2] The plaintiff's claim against the defendant was for the price of petroleum products sold and delivered to the defendant upon the defendant's request. The plaintiff filed an application to enter summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC") against the defendant as seen in encl. 5. On 26 July 2001, the solicitors for the defendant known as Messrs Y S Woo & Proctor failed to attend court on the hearing of the plaintiff's application for summary judgment. The learned senior assistant registrar ("SAR") allowed the plaintiff's application and

entered judgment against the defendant as seen in encl. 14. The defendant then filed an application in encl. 11 pursuant to O. 14 r. 11 of the RHC in order to set aside the summary judgment entered against the defendant but it was dismissed by the learned SAR on 4 March 2002. Being aggrieved, the defendant filed an appeal to the judge in chambers in encl. 18 against the decision of the learned SAR that was handed down on 4 March 2002.

[3] I heard the arguments of the parties and, in due course, I dismissed the defendant's appeal in encl. 18 with costs. This meant that the decision of this case would bind the case in D4-22-1549-2000. That ended the matter, once and for all.

Analysis

[4] Going to the heart of the matter, it would be apparent that the defendant had failed to satisfy the criteria for an application under O. 14 r. 11 of the RHC. The defendant's reasons for an adjournment of the hearing of the plaintiff's application for summary judgment in encl. 5 were not reasonable at all. According to the defendant, the defendant's solicitor did not intentionally refuse to attend court on 27 June 2001. In fact, according to the defendant, the defendant's solicitor wrote a letter dated 20 July 2001 to the learned SAR asking for an adjournment. It was argued on behalf of the defendant that if this court was not satisfied with the explanation given by the previous solicitor for his absence during the hearing of encl. 5, then this court should not dismiss the defendant's application in encl. 11 because to do so would be considered to be too drastic. For this proposition, the defendant cited the case of *Development & Commercial Bank Bhd v. Cheah Theam Swee* [1989] 2 CLJ 809; [1989] 1 CLJ (Rep) 474, a decision of Zakaria Yatim J (as he then was).

[5] Order 14 r. 11 of the RHC must be referred to. That order and that rule states as follows:

> Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the court on such terms as it thinks just.

I must categorically say that this r. 11 of O. 14 of the RHC must not be used as a device for granting time and the court must always be wary and must be satisfied of the reasons for the non-attendance by the party or his solicitor. Towards this end, it is ideal to refer to "*The Supreme Court Practice*", 1997 edition, at p. 182 to p. 183:

> ... and this rule must not be used as a device for gaining time. The Court will wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under O. 14.
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> It is unlikely that a respondent that withdraws from a hearing following the refusal of an adjournment will subsequently be entitled to apply under this rule. In *R. v. Kingston-upon-Thames Justices, ex p. Martin* [1994] Imm. A.R. 172, D.C., Simon Brown L.J. refused judicial review of a denial of an adjournment by a Magistrates' Court exercising a civil jurisdiction enabling it to entertain complaints for recovery of small sums. It was suggested the relevant criteria to be used in entertaining applications for adjournments included:
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> – the importance of proceedings and their likely adverse consequences to the party seeking the adjournment;
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> – the risks of prejudice or other disadvantage to each party in the conduct of the proceedings if the application were refused or granted;
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> – the convenience of the particular court together with general interest of justice in the efficient despatch of business and preventing waste of judicial time or delay to other litigants; and
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> – the extent to which the party applying for the adjournment had been responsible for creating the difficulty leading to the application.
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> It appears that provided that the Court has regard to such matters in exercising its judicial discretion the refusal of an adjournment cannot entitle a party to a fresh hearing on the merits before the Master.

It seems to be unlikely that a party who withdraws from a hearing following a refusal of an adjournment will subsequently be allowed to apply under O. 14 r. 11 of the RHC. I am fortunate that the criteria to be used for granting an adjournment of the hearing for summary judgment has been set out in "*The Supreme Court Practice*", 1997 edn as reproduced above, and I gratefully apply them in this judgment.

[6] From the court file, it would be apparent that the learned SAR had considered the following relevant facts before dismissing the defendant's application in encl. 11 pursuant to O. 14 r. 11 of the RHC. I too considered the same relevant and pertinent facts and they may be stated as follows:

(a) that there were two requests by the defendant for adjournments of the plaintiff's application for summary judgment and such requests were allowed by the court;

(b) that the date fixed by the court for the hearing of the plaintiff's application for summary judgment on 26 July 2001 was the free date given by the defendant's solicitors;

(c) that the plaintiff's solicitors had expressly made known to the defendant's solicitors that the former would not agree to any further requests for adjournments of its summary judgment application; and

(d) that the plaintiff's solicitors attempted to contact the defendant's solicitors on 26 July 2001 in order to inform the latter that they were required to attend court on that day but the attempt failed.

All these facts were captured in the affidavit of the plaintiff affirmed by Mary-Ann Gooi Pei Pei on 28 August 2001.

[7] Now, it must be borne in mind that the defendant filed the application under O. 14 r. 11 of the RHC principally because of the refusal of the court to grant an adjournment to the defendant during the hearing of the plaintiff's summary judgment application in encl. 5. The stand of the plaintiff was this. That the court had rightly and properly exercised its discretion in favour of the plaintiff for the following reasons:

(a) the prejudice sustained by the plaintiff by reason of the delay given the fact that the action was instituted on 16 August 2000, almost a year previously;

(b) it was a waste of precious judicial time; and

(c) there were no merits in the defendant's case at all.

For these varied reasons, it was argued that the defendant was not entitled to a fresh hearing in regard to the plaintiff's summary judgment application in encl. 5.

[8] On the question of whether the reasons advanced by the defendant for the adjournment of the plaintiff's application for summary judgment were reasonable or otherwise, I have this to say. That the granting of an adjournment has always been at the absolute discretion of the court. It revolves on the facts of the

case and unless it can be shown that the discretion of the court was improperly exercised, the exercise of the discretion should not be disturbed at all. This salutary principle was extolled by Hashim Yeop A. Sani J (as he then was) for the then Federal Court in the case of *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77. There, the salient facts were stated by his Lordship at p. 77 in this way:

> Although the argument in this appeal was confined to a point of small dimension it reflected the declining standards in the legal profession. Briefly, the facts of this unfortunate case can be summarised as follows. The respondent (plaintiff in the court below) claimed for payment of a sum allegedly due under an agreement executed with the appellant firm. The statement of claim was filed in the High Court at Kota Bharu on December 20, 1978. After the statement of defence was filed on March 26, 1979, the suit was fixed for hearing on August 17, 1980. Notice of trial was served on the appellant's solicitors on March 20, 1980. As shown in the record of proceedings on the date fixed for hearing the plaintiff's counsel was present but both the appellant and counsel were absent. Counsel for the plaintiff tendered in court a telegram which he had received from appellant's counsel which read as follows:
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> > Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows. Ngan and Tan.
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> Not surprisingly the learned judge was taken aback and the following note appears in the record of proceedings:
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> > The defendants' solicitors had been notified of the date of trial as early as 20th March, 1980. They should have booked the passage earlier. There is no proper medical report from the defendant. (Telegram marked D1)
> >
> > I disallowed the application for adjournment.
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> Judgment in default was entered against the defendant in the sum of $63,606.98 and interest at the rate of 6% per annum from date of judgment until realisation and costs. The defendant appealed.

Continuing, and stating the law, his Lordship aptly said (see p. 77 to p. 78 of the report):

> The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed. The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the courts. As stated in the grounds of judgment of the learned judge the case had been fixed for hearing about 5 months previously and suddenly on the date of hearing a telegram was received stating not only that counsel was unable to obtain a seat in the plane but also the defendant suddenly fell sick. One should also consider the difficult position of the courts in circumstances such as the present case. Here the learned judge has also stated that although he had entered judgment in default it would still be open for the appellant to apply to the court to set aside the order upon giving valid reasons. Unfortunately no such application was ever made to the learned judge.

Here, the learned SAR considered the reasons given in the letter dated 8 May 2001 from the defendant's solicitor requesting for an adjournment and he found the reasons to be insufficient (see exh. "GCPI" annexed to the affidavit of George C. Proctor that was affirmed on 14 August 2001 as seen in encl. 12).

[9] The justice of the case would certainly lie with the plaintiff in maintaining the judgment entered against the defendant. There were no procedural defects whatsoever in the order of the learned SAR that was handed down on 26 July 2001 and that judgment was regular. Even if there were any procedural defects in the order of the learned SAR and the judgment dated 26 July 2001, this court has the inherent jurisdiction to:

(a) excuse the non-compliance; or

(b) cure it under O. 2 r. 1 of the RHC,

after taking into account the substantial merits of the case and the interests of justice. The correct legal approach can be seen in the case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305, a decision of the Federal Court. There, Gopal Sri Ram JCA writing a separate judgment for the Federal Court aptly said at pp. 318-319 of the report:

> I will, in due course, deal with the regularity of the judgment entered against the defendants. But, for the moment, I would deal with the fallacy in the view expressed by counsel. It must be borne in mind that the default judgment in question is merely

irregular and not a nullity. Orders and judgments made or entered by such a court, in private law litigation, in the exercise of its coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of court or of practice, are merely irregular. They are not nullities. And it is quite wrong to describe them as such.

Any proceeding commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O. 2 r. 1 of the Rules of the High Court 1980 ('the RHC'). Whether a particular proceeding should be cured is, of course, a matter of discretion for the court whose assistance is prayed in aid to effect the cure. It is wrong to assume that the court is obliged in every case to overlook the breach of a rule of court. For that would mean that a litigant may honour the Rules of the High Court more by breach rather than observance. This is certainly not the law.

The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. That power, as in all matters calling for curial discretion, is to be exercised judicially having regard to the substantial merits of a case and having particular regard to the interests of justice. Thus, for example, to say that a judgment entered for too much is automatically bad or is automatically curable is to take an extreme position that is unsustainable in law. Such a judgment may be set aside if to cure it by amendment would be greater injustice to the particular defendant. On the other hand, such a judgment may be cured by amendment if not to do thus would result in greater injustice to the plaintiff. Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.

It must be emphasised that the Federal Court in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor (supra)* recognised that a default judgment, even if obtained in disregard of the rules (the rule being O. 13 r. 6(1) of the RHC), was not to be set aside because to do so would amount to an abuse of the court's process. This was what the Federal Court said (see the judgment of Gopal Sri Ram JCA at p. 323 of the report):

Encik Das, however, argued that it is not every judgment in default entered in breach of the provisions of O. 13 r. 6(1) that may be said to be fundamentally defective. He said that a court should uphold such a judgment in cases where to countenance an application to have it set aside would amount to an abuse of the court's process. In support of this submission, counsel cited the judgment of Robert Goff J (later Lord Goff of Chievely) in *Steward Chartering Ltd v. C & O Managements SA & Ors* [1980] 1 All ER 718 which was approved and applied by the English Court of Appeal in Jet *West Ltd & Anor v. Haddican & Ors* [1992] 1 WLR 487. I would observe that both cases were concerned with the issue of a Mareva injunction in aid of a judgment. I would also observe that in Stewart Chartering, the English Court granted leave to enter judgment in default despite the terms of O. 13 r. 6(1) in order to prevent an abuse of its process, and after the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way.

That great judge in the person of Mohd Azmi FCJ in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor (supra)*, writing a separate judgment, laid down the law in this way (see p. 313 to p. 314 of the report):

The subject matter in these appeals concerned a family dispute over the ownership and management of a sawmill in Tampin, which the plaintiffs, as administrators of the estate of Chin Sam Seong @ Chan Sam Seong, claimed to be part of the deceased's estate, and therefore unlawfully managed by the defendants. The plaintiffs had filed on 9 November 1991 a writ of summons against the defendants without a statement of claim, but with the prayers for declaratory reliefs, injunction and damages endorsed. Apart from the default judgment, there was also an order made to assess damages although there was no existing order granting damages to the plaintiffs.

The principle of setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed, the defendant must file an affidavit of merits, ie the defendant must disclose by affidavit evidence that *prima facie* he has a defence on the merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits (see *Evans v. Bartlam* [1937] AC 473).

Continuing at the same page and spilling over to pp. 314-315 of the report, his Lordship Mohd Azmi FCJ aptly said:

> Although under O. 2 r. 1(1) of the Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity and not a nullity, the court, like any other discretionary powers, must exercise its discretion to cure such procedural irregularity on correct principle. The proper approach that should be adopted on curability should be on the basis of the principle laid down recently by Lord Woolf MR in *Nicholls v. Nicholls* [1997] The Times, 21 January; 147 NLJ 61 on the exercise of the discretion conferred by the English RSC O. 59 r. 10(3) and s. 13(3) of the Administration of Justice Act 1960:
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> > I have cited extensively from the previous authorities to indicate that they show no common pattern of approach. The later cases do however make it clear that it is now recognised that O. 59 r. 10 (3) and s. 13(3) of the 1960 Act do give a court the power to rectify procedural defects both in the procedure leading up to the making of the committal order and after a committal order has been made. Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this, the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today, it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged comtemnor.
> >
> > The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical ground which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the comtemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

> In the future therefore it should not be necessary to revisit the authorities prior to the decision in *M v. P Butler and Butler*. It should be recognised that O. 59 r. 10 and s. 13(3) of the 1960 Act give the court a discretion which they are required to exercise. To decline to exercise that discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion.
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> On the basis of the above principle, the discretion available to this court to cure irregularities under O. 2 r. 1(1) of the RHC read together with s. 69(4) of the Courts of Judicature Act 1964 [the equivalent of the English O. 59 r. 10 (3)] and as well as s. 101 of the same Act which allows this court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the court ought not to be cured, in the exercise of the discretionary power.

Here, the learned SAR pronounced the judgment dated 26 July 2001 on the merits of the case and the defendant has failed to show any bona fide defence to warrant setting aside the plaintiff's application for summary judgment.

[10] I would venture to hold that the order of the learned SAR given on 26 July 2001 was a final order. In this regard, reference should be made to the case of *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553, a decision of the Court of Appeal. There, Gopal Sri Ram JCA writing for the Court of Appeal had this to say (see p. 561 to p. 562 of the report):

> Was the default judgment a nullity?
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> Encik Zainur Zakaria argued that the default judgment was a nullity and could be set aside at any time, even by a subsequent application. We do not agree.
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> The default judgment was, as we have already observed, irregular. But it was not an order made in defiance of a statutory provision. However, the order of learned judge dismissing the appellant's summons to set aside the default judgment was a final order. So was his order refusing to reinstate the dismissed summons.

The inherent jurisdiction in a court to set aside final orders made by it is one that must be exercised with much circumspection. It may be exercised in the case of an order made in contravention of an Act of Parliament. But the jurisdiction does not extend to a final order that is procedurally defective and hence merely irregular.

The necessity to carefully maintain the distinction between a final order of a court tainted by procedural irregularity and one made in contravention of statute was stressed by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. It was there recognised that (at p 394):

> ... any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. *It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law*. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception (per Mohd Azmi FCJ at 409.) (emphasis added.)

It is of importance to note that *Badiaddin* was a case in which the plaintiff had brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap 142). It was therefore an exceptional case, as the judgments of the Federal Court in that case make plain. We would observe that on its facts, the present appeal has none of the features that were present in *Badiaddin*'s case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision.

It can readily be summarised from the reading of the case of *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor (supra)*, that there is a sharp distinction between a final order of the court which is tainted with procedural irregularity and one which is made in contravention of a statute. Be that as it may, here, there were no procedural defects whatsoever in the order of the learned SAR given on 26 July 2001. Accordingly, the discretion of the court in

considering the application by the defendant to set aside the order dated 26 July 2001 must be exercised with extreme circumspection and in very exceptional cases only. Furthermore, none of the features that were present in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 can be found here. The learned SAR in allowing the plaintiff's application, in the circumstances of the present case, to enter summary judgment under O. 14 of the RHC as seen in encl. 5 was then *functus officio*. The correct approach for the defendant to adopt would be to appeal against the decision of the learned SAR that was given on 26 July 2001 and not to proceed under O. 14 r. 11 of the RHC.

[11] It was not wrong to say that there were no *bona fide* defences raised by the defendant to the plaintiff's claim. Now, from the defence and the counterclaim together with the affidavit of Ng Chen Leng that was affirmed on 8 January 2001 as seen in encl. 7, the following salient facts crystallised:

(a) the defendant had no objection to the price of the goods sold and delivered to the defendant by the plaintiff;

(b) the defendant had taken delivery of the goods from the plaintiff; and

(c) the defendant had used or consumed the goods delivered by the plaintiff totally.

In short, the defendant had not denied the sum of RM318,747.45 that was due and owing to the plaintiff as at 30 June 2000 which sum was for the price of the goods that were sold and delivered to the defendant. For these varied reasons, judgment for the aforesaid sum must be entered in this action against the defendant (*Development & Commercial Bank Berhad v. Dato' K.K. Sharma* [1987] 1 CLJ 268; [1987] CLJ (Rep) 566).

[12] In my judgment, the defendant after having taken delivery of the goods sent by the plaintiff must be held accountable for the payment of those goods and the plaintiff was entitled to sue for the price thereof. Section 42 of the Sale of Goods Act 1957 (Revised 1989) must be vigorously applied in favour of the plaintiff and to the detriment of the defendant. In *Universal Cable (M) Bhd v. Bakti Arena Sdn Bhd & Ors* [2000] 3 CLJ 375, I had occasion

to say something about s. 42 of the Sale of Goods Act 1957 (Revised 1989) and this was what I said (see p. 385 of the report):

> The goods that were delivered by the plaintiff were accepted by the first defendant. There was no intimation emanating from the first defendant that the goods sold and delivered were not in conformity with the specifications as stipulated by the first defendant. The first defendant's conduct in accepting those goods that were delivered by the plaintiff without notifying the latter of the alleged unmerchantibility of the goods constituted an acceptance of the goods so delivered. Section 42 of the Sale of Goods Act 1957 (Act 382) would certainly be construed in favour of the plaintiff and that section enacts that:
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> > The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.
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> In my judgment, there was acceptance of those goods and the first defendant had lost its right to reject those goods and the remedy available to the first defendant, if at all, would be confined to damages (*M.G. Sheth & Ors v. Lam Thye Co. Ltd.* [1954] 20 MLJ 230). On the authority of *Eastern Supply Co v. Kerr* [1974] 1 MLJ 1, the first defendant had no valid defence to the plaintiff's claim for the price of the goods sold and delivered.

Here, the defendant had not only accepted the petroleum products delivered by the plaintiff, the defendant even proceeded to use or consume the same. If there were any complaints as to the quality of the petroleum products, it was for the defendant to prove them and claimed for damages. This was also the stand adopted by the Court of Appeal (Mathew CJ, Murray-Aynsley CJ (S), and Hill J) in *M.G. Sheth & Ors. v. Lam Thye Co. Ltd* [1954] 20 MLJ 230. There Mathew CJ writing a short separate judgment said at p. 231:

> The tiles and ridges when delivered were neither BYMH brand nor the size contracted for. The tiles and ridges were off-loaded into lighters; part of the shipment was taken to Permatang Pau and the remainder were carried onwards to Alor Star for delivery to a sub-purchaser from the respondents.

A The only point in this appeal which requires consideration is whether the respondents accepted the consignment. In my view, their dealing with the consignment constituted an acceptance. The letter of 17th April, 1953 from the respondents to the second appellant did no more than suggest a settlement. In my view, on the authority of *Hardy & Company v. Hillerns & Fowler* [1923] 2 KB 490, the respondents had already accepted the consignment, when the letter of 9th June, 1953 was written by the respondents' solicitors. The respondents had lost their right to reject and were confined to their remedy in damages.

C The question of damages should be referred to the Registrar for assessment after due enquiry, the measure of damages being the difference between the value of the consignment actually received and the value which the consignment would have had had it been delivered in accordance with the contract description.

D **[13]** It must be borne in mind that any rejection of the goods delivered must be within a reasonable time and failing which the defendant will be deemed to have accepted the goods. In law, once the defendant was deemed to have accepted the goods, the defendant would have lost its right to reject the goods for breach E of condition and can only claim for damages. Perhaps it would not be out of place to refer to the case of *Eastern Supply Co. v. Kerr* [1974] 1 MLJ 10, a decision of the Singapore's Court of Appeal with a coram of Wee Chong Jin CJ, Chua & Kulasekeram JJ. That was indeed an interesting case and that case was also alluded to F by me in the case of *Universal Cable (M) Bhd v. Bakti Arena Sdn Bhd & Ors (supra)* and in that case Wee Chong Jin CJ, delivering the judgment of the Court of Appeal, said at p. 12 of the report:

G In the present case, the respondent and his wife chose the car themselves. There was no express warranty. The car was eight years old. The price was $1,400 which, although there is no direct evidence, was but a small fraction of the price of a new BMW-700 Coupe car. The respondent's wife had a test drive and the respondent agreed to buy the car after the test drive. She used it for about two weeks before she eventually rejected it. H During the two weeks there were minor defects such as a weak battery, difficulty in engaging the first and reverse gears and lack of tread on the tyres. These were defects which a reasonable man acting reasonably would accept under the circumstances of the case in performance of his offer to buy this secondhand car of this vintage and at the price paid. There is thus left the defects I which Mr. Frearson, who is admittedly not testifying as an expert witness, said he found. These are disputed by the appellants. The two approved examiners, who must be accepted as experts, did

not find the defects seen by Mr. Frearson. The trial judge found that Mr. Frearson had not satisfied him that the car had these defects. There was ample evidence for this finding and in our judgment Tan Ah Tah J ought not to have disturbed his finding and was wrong in relying on the events which occurred during the fortnight when Mrs. Kerr had the car and was using it as ample evidence that the car was unroadworthy.

Even on the assumption that the appellants were in breach of the implied conditions under section 14(1) and (2) of the Sale of Goods Act 1893, there is another ground for restoring the judgment of the trial court. Under section 35 the buyer is deemed to have accepted the goods, *inter alia*, 'when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them'. Once a buyer is deemed to have accepted the goods, he loses his right to reject for breach of conditions but can only claim for damages [see section 11(1)(c)]. It is always a question of fact whether or not a reasonable time has elapsed so as to preclude a buyer from rejecting the goods.

Going on an uphill task, the defendant claimed that the petroleum products were not of merchantable quality. The onus would be on the defendant to show that it was so. This approach was also recommended by the then Federal Court sitting in Singapore with a coram of Wee Chong Jin CJ, Tan Ah Tah FJ and Winslow J, in the case of *Seng Hin v. Arathoon Sons Ltd.* [1968] 2 MLJ 123. At p. 125 of the report, Winslow J, writing for the then Federal Court in that case aptly said:

In our judgment the plaintiffs/respondents have failed to show that the tapioca flour was of unmerchantable quality under English law. Undoubtedly, there was discoloration of a small portion of the flour but it must be borne in mind, as the trial judge himself found, that even the contaminated part did not contain any injurious ingredient. The flour may not have been in perfect condition but in our judgment, in the absence of evidence to the contrary, it was at least usable as starch. The sworn surveyor, Helmut Tillery, himself stated that the parcel of goods surveyed by him was tapioca starch and we can think of no reason why it could not have been used or sold as such. Moreover, it has not been satisfactorily proved that it was unfit for human consumption under our law.

In sharp contrast, no evidence was shown by the defendant to show that the petroleum products could not be used for any purpose that was ordinarily used, namely, as a fuel. In actual fact, the defendant used the petroleum products as fuel.

[14] Advancing further, it would be ideal to refer to the proviso to s. 16(1)(a) of the Sale of Goods Act 1957 (Revised 1989). The proviso should be applied to the facts of the present case. Here, the contract between the plaintiff and the defendant was for the sale of a specified article under its patent name, namely, PETRONAS, and thus there was no implied condition as to fitness for any particular purpose. That section enacts as follows:

> 16. (1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –
>
> (a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> (b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality:
>
> Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examined (sic) (examination) ought to have revealed.
>
> (2) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
>
> (3) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

And that very section was interpreted by the then Federal Court in the case of *Seng Hin v. Arathoon Sons Ltd. (supra)*. At p. 124 of the report, the learned judge said:

> On this question of law, the first matter to be considered is the meaning of the expression 'merchantable quality' in relation to this particular sale. It should be borne in mind that this was a sale of goods by description under their trade name to which the proviso to section 14(1) applies, *viz*., that in such a sale there is no implied condition as to their fitness for any particular purpose. We mention this proviso in order to draw attention to the fact that the fitness of goods for any particular purpose does not arise in the present appeal and cannot therefore form the basis of any complaint that the goods were therefore of unmerchantable quality.

Again, in the case of *Union Alloy (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [1993] 3 CLJ 670, Zakaria Yatim J, alluded to the same section and in particular his Lordship laid down the four pre-conditions found in s. 16(1)(a) of the Sale of Goods Act 1957 (Revised 1989). This was what his Lordship said

> I agree with Mr L H Ng that there are four preconditions laid down in s. 16(1)(a). These preconditions are:
>
> (a) The buyer must make known to the seller the particular purpose for which the goods are required.
>
> (b) There must be shown reliance by the buyer on the seller's skill and judgment; and the buyer must in fact rely on the seller supply (sic) (supplying) suitable goods.
>
> (c) The goods must be of a description which it is in the course of the seller's to (sic) business to supply.
>
> (d) If the goods are specific, they must not be sold under their patent or trade name.

Sad to say, none of the preconditions listed above have been proven by the defendant in the present case. The defendant failed to show any evidence pertaining:

(a) to the quality of the petroleum products that were delivered to it by the plaintiff; and

(b) in regard to the question of whether the petroleum products delivered by the plaintiff did not conform with any description accorded to it by the plaintiff, no affidavit evidence was advanced by the defendant to answer that question.

[15] In regard to the inability on the part of the defendant to prove the liability of the plaintiff and the damages suffered by the defendant, I have this to say. The defendant alleged that the bricks made in the kiln with the petroleum products supplied by the plaintiff as fuel were defective. How could the defendant prove this when the defendant by its own admission has also used other products as fuel for the kiln. There were so many possibilities for the cause of the defective bricks which have not been ruled out. This meant that the defendant was unable to prove any liability on the part of the plaintiff and the defendant too was unable to prove any damages suffered by it. In the circumstances, a trial would certainly be a waste of judicial time. It would be ideal to refer to the passages in the judgment of VC George JCA in the case of *Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd* [1995] 3 CLJ 171, CA. There at p. 184, VC George JCA commented:

> There was no evidence for the court to hold that the manufacturers' design drawings caused the mould maker to make defective moulds and in any event as has been seen the mould maker's evidence which was not contradicted was that he had been instructed by the plaintiffs not to follow '100%' the drawings.

And at p. 185 of the report, his Lordship observed:

> A claim for damages special and/or general has to be based on evidence of damages suffered.

Continuing in the same vein, further down the same page, his Lordship had this to say:

> No attempt or effective attempt had been made to prove the special damages claimed. The rejection by the learned judge of the claim for special damages is affirmed.

[16] It was quite apparent that the defendant was unhappy with the price of the petroleum products that were sold and delivered by the plaintiff to the defendant. The defendant wanted a lower price, a larger discount and a better rebate. Yet, the defendant claimed that the petroleum products were defective. Having utilised the petroleum products, the defendant was estopped from denying its merchantability.

[17] In regard to the question of the interest charged by the plaintiff on the late payment by the defendant of the price of the goods sold and delivered, a mere denial by the defendant cannot constitute a triable issue. The plaintiff's invoices stated that interest will be charged on late payments and the defendant did not lodge any protest at the time of the receipt of those invoices.

Conclusion

[18] For the reasons as adumbrated above, I dismissed the defendant's appeal in encl. 18 with costs. As agreed, this decision would bind the case in D4-22-1549-2000.